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Promoting human rights and democracy through the media since 1993

MS JOANMARIAE L. FUBBS

CHAIRPERSON: PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

FOR ATTENTION: MR. A. HERMANS

AHERMANS@PARLIAMENT.GOV.ZA

07 July 2017

Dear Ms Fubbs,

## **COPYRIGHT AMENDMENT BILL 2017 / SUBMISSIONS BY MEDIA MONITORING AFRICA**

### **1. INTRODUCTION**

- 1.1 Media Monitoring Africa ("MMA") is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom.
- 1.2 In the last 24 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes.
- 1.3 MMA has made submissions relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding

media accountable through the various means available – all of which can be found on MMA’s website. ([www.mediamonitoringafrica.org](http://www.mediamonitoringafrica.org))

- 1.4 A further unique element of MMA's work is focused on improving the portrayal and participation of Children and the media. Children, i.e. Citizens under 18, account for 35% of our population, yet only 6%<sup>1</sup> of our news. We also know that children are afforded special protection under our Constitution where section 28(2) states,

**"A child's best interests are of paramount importance in every matter concerning the child."**

- 1.5 We appreciate the opportunity to provide you, as we hereby do, our submissions on the Copyright Amendment Bill [2017].
- 1.6 We welcome the amendments in the Bill that clarify the rights or exploitation of copyright works over electronic communications (albeit that greater clarity and consistency in terminology is required.)
- 1.7 Furthermore, we welcome the fair use provisions, provisions for the rights of disabled and the amendments pertaining to the IP Rights Tribunal.

## **2 GENERAL ISSUES AND RECOMMENDATIONS**

- 2.1 MMA welcomes the amendments to the new, fair and practical limitations and exceptions in the Bill in line with international treaties and practices. Provisions for media, research, education, civic and many other uses are welcomed, especially in the context of a developing country and in a digital world. The limitations and exceptions for people with various disabilities are also very welcome. In this regard and to further strengthen the commitment to fair and practical limitations, we urge and recommend that the Marrakesh Treaty is ratified by South Africa as an urgent step.
- 2.2 Despite the intention to render copyright law relevant to the use and exploitation of works in a digital era, MMA submits that Copyright Bill in its current form does not adequately consider the application of copyright to digital media.
- 2.2.1 The tendency to use terminology such as “devices” in the existing law and the Bill fails to account for the distribution and reproduction of works on social media.
- 2.2.2 The Copyright Act defines a “computer programme” which associates with the use of instructions on a computer. The term computer has not been amended to provide a technology neutral

interpretation. Does a “computer programme” include websites, software applications, website applications or social platforms?

- 2.2.3 The currency of digital works for instance online press reports and news articles and its economic value associated with time is not accounted for in contemplating relief for infringement of copyright. What is the urgent relief to counter the unauthorised reproduction of news articles online or the adaptation of news articles culminating in so called fake news? Digital works are economically related to website visits for instance. We urge a review of the effectiveness of the self-regulatory relief provided for in the Electronic Communications and Transactions Act, 2002 through so-called take down notices to remove copyright infringing material. It is our submission that the remedies offered neither address economic losses nor provide the swiftness of action to deter online copyright infringement. We request, through this process that measures for urgent and effective relief for the unlawful reproduction and adaptation of digital works are introduced.
- 2.2.4 The geographical nature of copyright protection and implementation is problematic for the following reason: when publishing online, this publishing does not take place within a specific geographic location. Publishing on the internet cannot purport to be done within a specific geographic location.
- 2.2.5 The inclusion in certain instances that copyright works be “intended for reception by the public” presents regulatory uncertainty concerning the copyright status of works directed at private, closed communities. To account for subscription based models of copyright exploitation for instance online news services, we request that “public” is defined and clarified.

### 3 SPECIFIC ISSUES AND RECOMMENDATIONS

Please see Annexure A.

### 4 CONCLUSION

- 4.1 MMA is of the view that the Bill is an excellent step to improving on the outdated copyright law in the country. However, there is no doubt that the Bill, as it currently stands, is fundamentally flawed in its approach to digital works. The mere extension of copyright into electronic media does not adequately provide for the interests of rights holders of digital works.
- 4.2 MMA formally requests the opportunity of making oral submissions at any hearings to be held in respect of the Bill.

Please do not hesitate to contact us should you have any queries or require any further information.

Yours faithfully

A handwritten signature in black ink, appearing to be 'W. Bird', written over a horizontal line.

WILLIAM BIRD  
DIRECTOR  
MEDIA MONITORING AFRICA

## APPENDIX A: SPECIFIC PROPOSALS

SECTION OF 1978 ACT	PROVISION	COMMENTS	PROPOSED ALTERNATIVE (WHERE APPLICABLE)
1	<p>‘broadcast’ , when used as a noun, means a telecommunication service of transmissions consisting of sounds, images, signs or signals which(</p> <p>a) takes place by means of electromagnetic waves of frequencies of lower than 3000 GHz transmitted in space without an artificial conductor; and</p> <p>(b) is intended for reception by the public or sections of the public, and includes the emitting of programme carrying signals to a satellite, and, when used as a verb, shall be construed accordingly;</p> <p>‘broadcaster’ means a person who undertakes a broadcast;</p>	<p>We note our concern with the treatment of broadcasting in the Copyright Act and emphasise the importance of re-examining whether the regulation of broadcasts as contemplated in Copyright Act is well placed.</p> <p>Notwithstanding, other countries that have opted to retain issues of broadcasting in the Copyright Act have opted to align the definition of broadcast and broadcaster with existing definitions in other legislation. In order to promote regulatory certainty and legislation that considers a digital converged economy, we recommend that this approach is adopted in the Copyright Act.</p>	

1	<p>‘person with a disability’ includes a person who has a perceived or actual physical, intellectual, neurological or sensory impairment which, as a result of communication, physical or information barriers, requires an accessible format copy in order to access and use a work;”</p>	<p>Section 19D(5) of the 2015 Bill contained a simpler definition of a person with a disability - “a person that requires an accessible format in order to access and use a work to substantially the same degree as a person without a disability.”</p> <p>The South African Employment Equity Act 55 of 1998 defines disability in similarly broad terms -- “people with disabilities means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.</p> <p>The 2017 definition appears complex. The first part of the definition requires a "physical, intellectual, neurological or sensory impairment" -- the second part of the same sentence refers to "communication, physical or information barriers." Courts may apply interpretive rules to require that the two different sets of criteria be read as having different meanings with unclear impacts.</p>	<p>A simpler definition that would be more likely to cover all those who need it may be one that returns to the definition of disability from Section 19D of the 2015 bill or crafts a new definition based on the Employment Equity Act, e.g.:</p> <p>“People with disabilities" means people who have a long-term or recurring physical or mental impairment which substantially limits their ability to access and use a work without an accessible format."</p>
General Terminology	<p>“telecommunications service of transmissions”</p> <p>“communication by wireless means”</p> <p>“internet access”</p>	<p>The terminology which, by inference relate to the use of electronic communications are used inconsistently and at times incorrectly.</p>	<p>Technology neutral definitions that correspond with existing legislation should be introduced to effectively deal with the application of copyright in a digital era.</p>

General Terminology	"user"	<p>The term "user" is often included in the classes of rights holders when pronouncing the rights afforded to rights holders. Does a user refer to licensed users?</p> <p>The rationale for attributing copyright to users of work in legislation is unclear and a departure from copyright legislation norms.</p>	<p>Consolidate the use of various classes of rights holders (at times inconsistently) to rights holders.</p> <p>Introduce a definition of rights holders.</p>
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1	<p>‘technological protection measure’</p> <p>(a) means any process, treatment, mechanism, technology, device, system or component that in the normal course of its operation is designed to prevent or restrict infringement of work; and</p> <p>(b) does not include a process, treatment, mechanism, technology, device, system or component, to the extent that it controls any access to a work for non-infringing purposes;</p> <p>‘technological protection measure circumvention device’ means a device primarily designed, produced or adapted for purposes of enabling or facilitating the circumvention of a technological protection measure;</p>	<p>The definition of the technological protection measure circumvention device adds a degree of complexity to the subject of anti-circumvention of lawful measures to safeguard copyright.</p>	<p>Consolidate the definitions and consult international norms on copyright anti-circumvention provisions.</p>
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2	<p>Works eligible for copyright</p> <p>(1) Subject to the provisions of this Act, the following works, if they are original, shall be eligible for copyright-</p> <ul style="list-style-type: none"> <li>(a) literary works;</li> <li>(b) musical works;</li> <li>(c) artistic works;</li> <li>(d) cinematograph films;</li> <li>(e) sound recordings;</li> <li>(f) broadcasts;</li> <li>(g) programme-carrying signals;</li> <li>(h) published editions;</li> <li>(i) computer programs.</li> </ul>	<p>The clear international trend in copyright law is to move away from providing copyright protection for productions that do not reflect creative activity but merely represent the outcome of skill and effort.</p> <p>Protection for “broadcasts” and “programme- carrying signals” belongs, if anywhere, in broadcasting legislation, rather than in copyright. No modern copyright law recognizes these as categories of copyrightable subject matter, though some national laws do provide limited protection under other rubrics.</p>	<p>Works eligible for copyright</p> <p>(1) Subject to the provisions of this Act, the following works, if they reflect original authorship and are fixed in tangible form, shall be eligible for copyright- ...</p> <p>Delete references to “broadcast” and “programme carrying signals” in the entire section.</p>
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4	<p>(1) Copyright shall be conferred by this section on every work which is eligible for copyright and which -</p> <p>(a) being a literary, musical or artistic work or a sound recording is first published in the Republic;</p> <p>(e) being a cinematograph film, is first published or made in the Republic;</p> <p>(e) being a published edition, is first published in the Republic;</p> <p>(f) being a computer program, is first published or made in the Republic</p>	<p>The concern relates to the strict requirement of first publication in the Republic for the conferring of copyright.</p> <p>The distribution of information systems, the hosting of information systems, the hosting of websites globally presents a technical difficulty in controlling the first rendering of a work and ultimately where it is first published. Furthermore, business models of outsourcing particularly to further intellectual endeavour in economic terms present a concern that works may be made outside the Republic.</p> <p>Beyond the mere recognition of copyright in digital forms of works, or when communicated digitally, the Act must resolve how traditional criteria for copyright subsistence may be adapted to accommodate current ICT processes giving rise to copyright works.</p>	
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5	2(a) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by, funded by, or under the direction or control of the state or an international or local organisations.	<p>The international and local organisations to which this automatic conferring of copyright is granted is unclear.</p> <p>Furthermore, the conferring of copyright to state funded, or (unknown) international or local organisation funded works is a concerning departure from the norm of grants designed to stimulate economic endeavour and not for the purposes of ownership by the state or such organisations of the works resulting from the intellectual property of grantees.</p> <p>The local organisations contemplated by this section and rationale for inclusion of local organisations in this clause - are unclear.</p>	<p>Delete “funded by”.</p> <p>Delete “local organisations”.</p> <p>Ensure that the rights granted to international organisations are restricted to prescribed international organisations in accordance with the Copyright Act in force.</p> <p>This section appears to conflict with the Intellectual Property from Public Financed and Research Development Act No. 51 of 2008, which grants ownership of intellectual property in state funded works to research institutions.</p> <p>The goals of promoting public access to government funded research can be effected through open access policies for government funded research. control, i.e.:</p>
6,7,8,9	6(eA) 7(dA) 8(dA) 9(e)	<p>The extension of copyright to provide for the electronic communication, as intended is welcomed.</p> <p>The terminology “wire or wireless means” “internet access” and the proviso “whether interactively or non-interactively” renders the provisions vague.</p>	

<p>6, 7, 8</p>	<p>6 ...Provided that, notwithstanding the transfer of copyright in a literary or musical work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of such copyright work.</p> <p>7 ... Provided that, notwithstanding the transfer of copyright in an artistic work by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of such copyright work.</p> <p>8 Provided that, notwithstanding the transfer of copyright in a cinematograph film or audiovisual fixation by the user, performer, owner, producer or author, the user, performer, owner, producer or author of such work shall have a right to claim an equal portion of the royalty payable for the use of the copyright film or fixation.</p>	<p>The issue of whether to have an ongoing royalty payment post transfer of copyright is complex one that merits a close, empirical study to determine the administrative costs and administrative oversight of the necessary system to realise such right.</p> <p>The application of the right of royalty to digital media and enforcement on digital media is a second critical consideration.</p> <p>How does this provision apply to copywriters or graphic designers or music used in viral advertising campaigns?</p> <p>What is the process of due diligence to determine the royalties payable and to whom when using literary or musical works?</p> <p>Particularly in creative industries this could deter existing business models of outsourcing creative, design, artistic work and ultimately prejudice the creators themselves who rely on such outsourced work.</p> <p>This section negates contractual arrangements between a creator and owner of copyright work following transfer of copyright. This section has the effect of denying business models premised on the transfer of copyright. Furthermore,</p>	<p>Where resale rights exist, they are generally limited to works of fine art that cause a particular problem with later sales being made at very high levels with no benefit to the artist. This same problem does not generally occur in other markets. Of course, every new expression of a copyrighted work (such as of music for a ring tone or on an advertisement) is subject to licensing. But resales of copyrighted goods (books, CDs) are generally not - in part to permit and encourage used goods markets.</p> <p>CN: The introduction of the 'communication to the public' right first featured in 2015 and whilst it is not bad of itself, the number of cases that have reached the CJEU on the interpretation of art 3(1) of the InfoSoc Directive tells us that this is a complex matter, particularly in the digital environment.</p>
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		there is a potential duplicity in obligations that must be reviewed. What for instance will the user's obligations be to the owner of the copyright to whom the copyright is transferred?	
9B	Resale Royalty Rights	The section creates a significant burden to manage over time with extensive liabilities to creators of artistic works. If Artists' Resale Royalty provisions are retained in the final version of the Copyright Amendment Act, digital works should be exempt. Granting resale rights for all images, including on the internet, could lead to unforeseen consequences for the functioning of the internet and digital media in South Africa.	It is not clear from the provision who will pay the royalty and how. One model is to restrict the application of the right to sales over a certain amount and to require the payment of the royalty by the gallery or auction house. This would avoid every sale at a craft market being subject to a resale royalty.

12		Inadequate fair use and quotation provisions	<p>Add the words “such as” to the introductory language in the new proposed general exception in Section 12 of the Act, so that it reads: “In addition to uses specifically authorised, a fair dealing or use with respect to a work or performance for purposes such as the following does not infringe copyright in that work: . . .”</p> <p>This change would follow the examples of the U.S., Israel, Korea and many other countries in enabling the general exception for fair uses to be potentially applicable to fair uses of copyrighted content for any SA Copyright Amendment Bill 2 purpose, including those future uses that cannot be foreseen by the legislature at present. 2. Delete the second comma in Section 12A (a), the addition of which makes the provision only applicable to “a summary of that work,” instead of to all quotations as the provision has historically operated.</p>
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12A(c)	<p>...is intended exclusively for lawful broadcasts of the broadcaster and is destroyed before the expiration of a period of six months immediately following the date of the making of the reproduction, or such longer period as may be agreed to by the owner of the relevant part of the copyright in the work: Provided that any such reproduction of a work may, if it is of an exceptional documentary nature, be preserved the archives of the broadcaster, but shall, subject to the provisions of this Act, not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work.</p>	<p>The rationale for the destruction after six months as opposed to 14 days or 30 days for instance is unclear.</p> <p>Destruction must be defined to specifically require that the work cannot be reconstituted using technical means i.e. permanent destruction.</p> <p>Furthermore, the subjective test of what would constitute work of an exceptional documentary nature is problematic.</p>	
	<p>(8) Encryption of computer-generated data is allowed to an extent that it is necessary to decrypt data in a protected state without resulting into incrimination.</p>		Delete

13A	<p>Temporary reproduction and adaptation</p> <p>(a) to enable the transmission of the work in a network between third parties by an intermediary or any other lawful use of the work;</p> <p>(b) to adapt the work to allow use on different technological devices, such as mobile devices, as long as there is no independent economic significance to these acts.</p>	<p>The assurance for internet service providers is welcomed. The assurance is however limited in scope and conflicts with the provisions of the Electronic Communications and Transactions Act. Should a broader limitation of liability not be introduced, then the clause itself may be improved.</p> <p>Adding to the inconsistency in referring to digital communications across the Act, the use of the word “network” is another case in point.</p> <p>The ambiguity in this clause is borne from the reference to “independent economic significance”.</p> <p>Furthermore, it is unclear as to who is contemplated by the term “intermediary” and this should be clarified.</p>	<p>For recent modern examples of transient copy exceptions, see New Zealand Copyright Act 1994 (amended 2011) Section 43A; Switzerland, Federal Law on Copyright and Related Rights (2008), Ch. 5, Art 24; Poland Act 2/4/94 Art 75(1); Denmark Copyright Act of 2010; Australia Copyright Act of 1968 (Amended 2012), Sections 43A and 43B</p> <p>Ensure consistent terminology when referring to digital communications and associated terminology.</p>
15	<p>Special exceptions from protection of artistic works</p> <p>(1) The copyright in an artistic work shall not be infringed by its inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such inclusion is merely by way of background, or incidental, to the principal matters represented in the film, broadcast or transmission.</p>	<p>The incidental use exception in 15(1) is unduly restricted. It fails, for example, to authorize the incidental capture of audiovisual works (a television or radio in the background), photographs, or performances (e.g. a street band) of the kind commonly captured in cinematographic film. The exception also leaves out key works that commonly incidentally capture background material, such as photographs, paintings, etc.</p>	<p>Special exceptions for incidental copying and with relation to works in public spaces.</p> <p>(1) The copyright in a work shall not be infringed by its inclusion in another work if such inclusion is merely by way of background, or incidental, to the principal matters represented in the new work.</p>



15	<p>(3) The copyright in an artistic work shall not be infringed by its reproduction or inclusion in a cinematograph film or a television broadcast or transmission in a diffusion service, if such work is permanently situated in a street, square or a similar public place.</p>	<p>The right of panorama in 15(3) is unduly limited. It should be expanded to include photographs and other images (such as paintings). The 2001 EU Directive on Copyright (Art. 3), for example, broadly applies to any “work” included in “any material” -- permitting “incidental inclusion of a work or other subject-matter in other material. The language proposed for 2 is adapted from the German Copyright Act Art 59</p>	<p>(2) It shall be permissible to reproduce, distribute and make available to the public works located permanently in public roads and ways or public open spaces. In the case of buildings, this authorisation shall only extend to the façades thereof.</p>
20	<p>(3) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work has the moral right to –</p> <ul style="list-style-type: none"> <li>(a) be attributed as the creator;</li> <li>(b) not to be falsely attributed; and</li> <li>(c) not to have their work treated in a derogatory manner.</li> </ul>	<p>The vagueness of sub-section (c) of this section is problematic, particularly as “derogatory manner” is open to subjective interpretation. The clause wording must be improved to clarify what restrictions are contemplated “a derogatory manner.”</p>	

20	<p>(4) Notwithstanding the transfer of the copyright work in a television, film, radio, photography or crafts work to the owner, the creator of the copyright work or the performer has, exclusive of contractual arrangements, the moral right to receive royalty payments –</p> <p>(a) when repeats of the film, television, radio, photography or art work is used as prescribed by the Minister.”</p>	<p>Any general notion that contributors enjoy a continued, non-contractual right to receive royalties/residuals will seriously limit the usefulness of fair use for filmmakers. Even if the language is limited to TV rerun, its implications could be undesirable. In general, so-called “residual payments” are provided for in individual or group contracts, rather than in national law.</p>	<p>Delete (and perhaps consider incorporate in SA’ Performers Protection Act.)</p>
22	<p>(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing signed by or on behalf of the assignor, the licensor or, in the case of an exclusive sublicense, the exclusive sublicensor, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment</p>	<p>We submit that a contract should permit perpetual assignment.</p> <p>Problematically, this language requires hardcopy signatures. This is not conducive in a digital economy. Electronic approval and signatures should be permitted in addition.</p>	<p>(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed, including in electronic form, by or on behalf of, the assignor, the licensor or, in the case of an exclusive sub-licence, the exclusive sub-licensor, as stipulated in the Schedule hereto or as the case may be: Provided that such assignment of copyright shall, unless expressly agreed otherwise in writing, be valid for a period of 25 years from the date of agreement of such assignment.</p>

9E	<p>9E. Assignment or waiver</p> <p>(1) Assignment or waiver of a resale royalty right is unlawful.</p> <p>(2) Any term of an agreement which purports to assign or waive a resale royalty right is unenforceable.</p>	<p>This provision would prohibit an author from selling or assigning a resale royalty right.</p> <p>Particularly for the commissioning of digital works that are reproduced by the rights holder (post assignment, distributed and adapted in various forms, assignment is a necessary legal risk mitigation step. Prohibiting the assignment of copyright works goes against ordinary trade or the waiver of the resale royalty right unreasonably interferes with ordinary trade with the result that South African procurers may prefer works that are not subject to South African copyright law.</p>	Delete section.
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13A	<p>13A Temporary reproduction and adaptation</p> <p>(1) Anyone is permitted to make transient or incidental copies of a work, including reformatting, an integral and essential part of a technical process, provided that the purpose of such copies or adaptations is-</p> <p>(a) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work; or</p> <p>(b) to adapt the work to allow use on different technological devices, such as mobile devices, provided there is no independent economic significance to these acts.</p>	<p>There is no current exception in the Bill for permanent copies that are nevertheless incidental to uses of works for technological processes. For example, Internet search relies on making copies of content on the Internet and searching that copy. Machine learning and artificial intelligence rely on massive amounts of incidental copying. To authorize such uses, this provision could be re-written to state:</p> <p>13A Technological reproduction and adaptation</p> <p>(1) Anyone is permitted to make transient or incidental copies of a work, including reformatting, where such copies are an integral and essential part of a technical process and have no independent economic significance, including acts such as:</p> <p>(a) to enable a transmission of a work in a network between third parties by an intermediary or a lawful use of work; or</p> <p>(b) to adapt the work to allow use on different technological devices,</p> <p>(c) to undertake computational analysis, indexing, search, data mining or to enable other uses of works that do not express the work or otherwise compete with the work in the same market as the original.</p>	
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22	<p>(8) Where the doing of anything is authorized by the grantee of a licence or a person deriving title from the grantee, and it is within the terms, including any implied terms, of the licence for him to authorize it, it shall for the purpose of this Act be deemed to be done with the licence of the grantor and of every person, if any, upon whom the licence is binding.</p>	<p>The proposed revision (see recommendation) suggests a simpler way of saying that sub-licensees are permitted to act without the consent of the original licensor, while eliminating the troublesome notion that one can “derive title” from a licensee.</p>	<p>Unless otherwise prohibited from doing so, a licensee may grant a sub-licence or sub-licences for the doing of acts that fall within the terms of the licence, including its implied term, without the consent of the original licensor.</p>
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39B	<p>39B. Unenforceable contractual term</p> <p>(1) To the extent that a term of a contract purports to prevent or restrict the doing of any act which by virtue of this Act would not infringe copyright or which purport to renounce a right or protection afforded by this Act, such term shall be unenforceable.</p> <p>(2) This section does not prohibit or otherwise interfere with public and open licences to do any act which is subject to copyright or moral rights, settlement agreements, terms of service licences and the voluntary dedication of a work to the public domain."</p>	<p>39B (1) contains important protections ensuring that contractual terms cannot negate the user rights in the act. Some terms of service or sales agreements, for example, attempt to prohibit making private copies even where that right is clearly one of the user under copyright.</p> <p>The first part of the clause is taken from UK law, which states in reference to parody rights:</p> <p>"(2) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable."</p> <p>Note that the UK version does not ban any "renouncement" of rights. The inclusion of this term raises difficult issues as to how authors may contract out their rights in order to profit from them. It would be better to delete this aspect for the section.</p> <p>39B(2) has been added, making clear that the last clause, forbidding the renouncement of rights, does not interfere with the effectiveness of public and open licences (CC, FLOSS, etc.). The clause needs to be re-written however, as it seems to provide "this section does not prohibit . . . open licences to do any act which is subject to . . . settlement agreements,</p>	<p>It should read:</p> <p>"(2) This section does not prohibit or otherwise interfere with public and open licences or voluntary dedications of a work to the public domain."</p> <p>Unenforceable contractual terms that contain unlawful terms of service particularly in online terms of services for websites, portals and the like that house copyright information should not be merely excluded from the application of 39B(1).</p> <p>Unenforceable licence terms should similarly be dealt with separately. The term "terms of service licences" is ambiguous and vague.</p>
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		<p>terms of service licences and the voluntary dedication of a work to the public domain.” That does not grammatically make sense.</p>	
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